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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal-State Joint Board on Universal Service	))))	CC Docket No. 96-45

AT&T REPLY TO OPPOSITIONS TO PETITION FOR RECONSIDERATION AND CLARIFICATION OF THE *METHODOLOGY ORDER*

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Pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, AT&T Corp. ("AT&T") replies to other parties' oppositions to AT&T's petition for reconsideration and clarification of certain rulings in its Ninth Report & Order and Eighteenth Order on Reconsideration, FCC 99-306, released November 2, 1999 ("*Methodology Order*") and published in 64 Fed. Reg. 67416 (December 1, 1999), in the Commission's *Universal Service* proceedings.[1] In addition, AT&T opposes the Ohio Commission's waiver request in this matter.

SUMMARY

As shown in Section I, the contentions of several local exchange carriers ("LECs") that the maximum amount of USF support that a new entrant using unbundled network elements ("UNEs") receives should be the amount paid for the UNEs with the remainder going to the LEC is largely an attempt to reargue the price of UNEs, a matter outside the

[1] Bell Atlantic, BellSouth Corporation ("BellSouth"), GTE Service Corporation ("GTE"), MCI WorldCom, Inc. ("MCI WorldCom"), the National Rural Telecommunications Association ("NRTA")/ National Telephone Cooperative Association ("NTCA"), Public Utilities Commission of Ohio ("Ohio Commission"),

(footnote continued on following page)

scope of this proceeding. Maintaining the UNE cap on USF support is unnecessary to avoid arbitrage and would tend to thwart entry in high-cost areas contrary to the Commission's objectives. As AT&T demonstrates in Section II, contrary to the LECs' position, adopting AT&T's suggestion that the Commission *require* that support be targeted to the high-cost deaveraged UNE zones and distributed on a uniform per-line basis within each zone, would eliminate arbitrage opportunities. As discussed in Section III, to avoid anticompetitive use and to comply with Section 254(e), if a LEC uses USF support to upgrade facilities, those facilities must be located in or used to provide service to high-cost areas. Finally, as shown in Section IV, the Commission should not grant the Ohio Commission's request for a waiver of the May 1, 2000 date for deaveraging UNEs for GTE and Sprint.

I. A NEW ENTRANT THAT WINS THE CUSTOMER SHOULD GET THE FULL MEASURE OF HIGH-COST SUPPORT THAT THE INCUMBENT WAS RECEIVING FOR THE LINE.

A number of LECs oppose AT&T's request that the Commission reconsider its holding that if a competitive entrant serves the customer exclusively through unbundled network elements, it would obtain universal service support for that high-cost line, not to exceed the cost of the UNEs used to provide the supported services, with the balance of the support to go to the incumbent. *See* Bell Atlantic 2-4; BellSouth at 3; GTE at 9; U S WEST at 2.

First, Bell Atlantic (at 2) contends that allowing a UNE-based entrant to receive the full USF support would create arbitrage opportunities because USF support allocated to the

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(footnote continued from previous page)

U S WEST Communications, Inc. ("U S WEST"), and the Virgin Islands Telephone Corporation ("Vitelco"), filed oppositions to petitions for reconsideration.

wire center level is more deaveraged than the UNE zone. As a result, Bell Atlantic argues that under AT&T's proposal a new entrant could keep higher USF support for a wire center although it is buying the UNE at the lower UNE zone rate. It further maintains that retargeting USF to the UNE zone would still allow AT&T to target entry to lower cost wire centers within the zone and arbitrage USF support against the cost of the UNE.

Bell Atlantic conveniently overlooks the fact that AT&T has expressly petitioned the Commission to *require* that USF "support be targeted to the high-cost deaveraged UNE zones *and* distributed on a uniform per-line basis within each zone." AT&T Petition at 1 (emphasis added). With uniform per-line distribution of USF support within a UNE zone, the arbitrage picture that Bell Atlantic paints simply would not exist.

Second, Bell Atlantic (at 3), GTE (at 9) and U S WEST (at 2) argue that conversion to USF support based on forward-looking cost does not change things since the initial May 1997 *Universal Service Order*[2] because the cost proxy model is not used to set UNE rates, and such rates may not fully compensate the LEC. They contend that giving the entrant the full USF support would: (1) constitute a windfall, and (2) create a disincentive for new entrants to deploy facilities in high-cost areas and instead rely on UNEs. Thus, they conclude, the Commission is correct in capping the USF support to the UNE price paid by the new entrant and giving any remaining USF support to the incumbent.

As AT&T (at 4) explained, however, like the incumbent, the new entrant also has costs that are in addition to the cost of the UNEs. Thus, there is no windfall to the entrant if it receives the full measure of support. Indeed, the record is clear that a new entrant that

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[2] Federal-State Joint Board on Universal Service Reform, CC Docket No. 96-45, Report and Order, FCC 97-157, released May 8, 1997 ("Universal Service Order").

wins the customer by providing universal service using UNEs meets the requirements of Section 214(e)(1)[3] and should be entitled under the portability provisions of the Commission's rules to the full measure of support. Nor is it unfair to the incumbent because the incumbent will be compensated by the new entrant for the full forward-looking cost of the UNEs that it is providing to the entrant. In fact, if the support amount above the cost of the UNEs were to go to the incumbent, the incumbent would be compensated above economic cost even though it is no longer serving the customer. The paradigm that the Commission has established is anticompetitive because the incumbent would keep part of the support which belongs to the *customer* not the incumbent, even though the incumbent has failed to retain the customer in the market. GTE's assertion (at 9) that the USF support belongs to the facilities provider is plain wrong. *Alenco Communications Inc. v. FCC*, No. 98-60213, 2000 WL 60255, slip op. at 7 (5th Cir. Jan. 25, 2000); *see also* NRTA/ NTCA at 6.

To the extent that the incumbent LEC gets the difference between the USF support and UNE price, it would be a blatant end-run of the forward-looking pricing principles for UNEs adopted by the Commission in the *Local Competition Order*, 11 FCC Rcd 15499, ¶¶ 672-703 (1996). After all of the exhaustive efforts the Commission and the states have undertaken to establish lawful UNE prices, those prices must be deemed fully compensatory. In all events, the USF proceeding is certainly not the place to reargue the price of UNEs. Moreover, contrary to GTE's and U S WEST's contention, maintaining the UNE cap on USF support provides powerful *disincentives* for entry in those areas via

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[3] *Universal Service Order* ¶ 169.

UNEs, which is the most likely entry mechanism in such areas. It does not provide incentives to enter on a build basis.

Third, U S WEST (at 2) contends that the FCC's rule should be modified such that an entrant using UNEs receives high-cost support only if the UNE price exceeds the benchmark because otherwise the entrant would essentially obtain the UNE for free. This proposal runs counter to the Commission's requirement that USF support be portable to the new entrant. Moreover, the benchmark to which U S WEST would tie USF support would deny the entrant hold-harmless amounts in those states where the average per-line cost is below the benchmark but the incumbent had historically received high-cost support.

In short, the Commission should adopt AT&T's proposal that a UNE-based entrant receive the full high-cost support associated with the customer's line and thus allow the Commissions 's own stated objectives to be realized. In the *Methodology Order*, the Commission expressly recognized that "federal universal service high-cost support should be available and portable to all eligible telecommunications carriers, and conclude[d] that the *same* amount of support (*i.e.,* either the forward-looking high-cost support amount or an interim hold-harmless amount) received by an incumbent LEC should be fully portable to competitive providers." *Id.* ¶ 90 (emphasis added). Indeed, the Commission emphasized that "[t]o ensure competitive neutrality, . . . a competitor that wins a high-cost customer from an incumbent LEC should be entitled to the same amount of support that the incumbent would have received for the line, including any interim hold-harmless amount." *Id.* It further stated that "[w]hile hold-harmless amounts do not necessarily reflect the forward-looking cost of serving customers in a particular area, . . . this concern is outweighed by the competitive harm that could be caused by providing unequal support amounts to incumbents and competitors. Unequal federal funding could discourage competitive entry in high-cost areas and stifle a competitor's ability to provide service at rates competitive to those of the incumbent." *Id.* These indisputably correct findings compel the Commission to eliminate the UNE cap on USF high-cost support.

II. THE COMMISSION SHOULD REQUIRE THAT SUPPORT BE TARGETED TO THE HIGH-COST DEAVERAGED UNE ZONES.

AT&T urged the Commission to *require* states to target support based on UNE zones so that USF support and the underlying costs of the elements used to provide service are more closely aligned. As AT&T showed (at 5-6), providing high-cost support on a UNE zone basis and with a uniform amount of per-line support within each zone ensures that UNE prices and universal service support maintain a consistent relationship and avoids undesirable arbitrage.

GTE (at 4-5) nonetheless contends that the Commission should not require that USF support be targeted to the high-cost deaveraged UNE zone as arbitrage opportunities would still exist if retail rates, which contain implicit subsidies, are not also deaveraged. USF support is designed to allow customers in high-cost areas to pay local rates that are comparable to those in low-cost areas. Thus, GTE's argument that retail rates must be deaveraged is a *nonsequitur*. Indeed, GTE's current position is an about-face. As GTE has previously shown, "use of different zones for USF, UNE loops and SLC could lead to a competitive imbalance and uneconomic arbitrage and therefore should be avoided."[4] For

[4] GTE Comments, filed October 29, 1999, in Access Charge Reform, *et al.* (LEC Pricing Flexibility FNPRM), CC Docket Nos. 96-262, 94-1, 98-63, 98-157, at 13.

example, if different zones are set for the USF and UNE loop rates, universal service funding may not align with costs.

As BellSouth (at 3) correctly explains, "[t]he current split of universal service support between competitive ETCs providing service through UNEs and incumbent LECs is a preventative measure that ameliorates the undesirable effects of arbitrage. The curative measure is to remove the disparity in disaggregation levels." AT&T agrees. Indeed, the Commission had stayed its rule requiring the geographic deaveraging of UNEs, in part, until it resolved issues of targeting high-cost support.[5] Now that the Commission has achieved that objective, it makes no sense to proceed by allowing states to set UNE cost zones as if these issues were never linked. The states have the prerogative of determining the size (number of wire centers) of the UNE cost zones. All AT&T is asking is that, once having done so, the Commission require the states to target the USF support to the high-cost UNE zones.

Providing high-cost support on a UNE zone basis and with a uniform amount of per-line support within each zone, as AT&T requests, ensures that UNE prices and universal service support maintain a consistent relationship and avoids arbitrage. The alignment of UNE cost and USF support would furthermore give entrants a better sense of the support they would receive in a given zone before embarking on the decision to purchase UNEs. Moreover, requiring carriers to use the same zones for UNE loop and USF would avoid the need for the Commission to review a multitude of state waiver requests.

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[5] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996: Deaveraged Rate Zones for Unbundled Network Elements, CC Docket No. 96-98, Stay Order, FCC 99-86, released May 7, 1999 ("Stay Order").

III. THE COMMISSION SHOULD CLARIFY THAT HIGH-COST SUPPORT MUST BE USED IN OR FOR THE BENEFIT OF WIRE CENTERS THAT ARE TARGETED AS RECIPIENTS OF SUPPORT.

A number of LECs misconstrue AT&T's request (at 7) that the Commission clarify that high-cost support must be used in wire centers that are targeted as recipients of support believing that adoption of AT&T's suggestion would interfere with states' authority to set intrastate rates. *See* Bell Atlantic at 4; GTE at 7. For example, GTE (at 7) states that "[c]arriers should be able to use universal service support in a variety of ways, including to reduce intrastate rates in high-cost areas, replace implicit subsidies (which hold down rates in high-cost areas) with explicit subsidies, or invest in facilities that serve high-cost areas. In addition, improved facilities in one wire center can benefit the provision of service in other areas."

AT&T does not disagree with GTE that federal USF support may properly be used in all of the ways GTE describes. However, to the extent that a LEC uses USF support to *upgrade facilities*, those facilities must be located in or used to provide service in high-cost areas that are the targeted recipients of support. In other words, although a LEC could use USF support to lower rates in low-cost zones by replacing implicit support that had been embedded in urban rates, a LEC may *not* use USF support to upgrade facilities located and used in low-cost areas (*e.g.,* to deploy xDSL loops in urban areas).

As AT&T (at 7) showed, Section 254(e) of the Communications Act permits carriers to use universal service support "only for the provision, maintenance and upgrading of facilities and services for which the support is intended." Accordingly, the Commission has properly required the states to certify that high-cost support received by non-rural carriers in their state is being used appropriately consistent with this mandate. *Methodology*

Order ¶ 95. The Commission has also appropriately given the states the flexibility how to comply with this objective. For example, a state could adjust intrastate rates based on the federal support received or it could require carriers to use the support to upgrade facilities in rural areas. *Id.* ¶ 96. AT&T's clarification request is entirely consistent with the Commission's holdings and the requirements of Section 254.

IV. THE COMMISSION SHOULD NOT GRANT THE OHIO COMMISSION A WAIVER OF THE UNE DEAVERAGING RULE.

As AT&T demonstrated in its opposition to GTE Florida's petition for reconsideration,[6] GTE's request for further delay in implementing the Commission's 1996 deaveraging rule, in addition to being beyond the proper scope of this proceeding, is flatly inconsistent with the 1996 Act and the Commission's competition policies.[7] Many states have completed the exercise of establishing deaveraged UNE loop rates years ago, and, under the FCC's stay, other states will have had 18 months since the Supreme Court upheld the FCC rule to complete their proceedings. Although more than 20 states were able to establish deaveraged loop rates within the nine-month arbitration process, a waiver process is available if, based on unique circumstances, a state believes it cannot comply with the May 1, 2000 date. *Stay Order* ¶ 7.

Although the Commission stated that it would entertain state waiver petitions, the Ohio Commission's request for a one-year extension of time to complete UNE deaveraging

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[6] AT&T Opposition to Petitions for Reconsideration of the *Methodology Order*, filed February 7, 2000, at 2-9.

[7] Section 252(d)(1) of the Act requires LECs' rates for UNEs to be nondiscriminatory and based on cost, which the Commission has properly interpreted to require geographic deaveraging of UNEs to reflect underlying cost differences.

for GTE and Sprint does not even meet the threshold "good cause therefor"[8] standard for grant of a waiver. As the Ohio Commission (at 2-3) concedes, it has completed establishment of deaveraged UNE rates for Ameritech and Cincinnati Bell. For Ameritech, it took the Ohio Commission eight months to complete the process (from October 1996 to June 1997) and public hearings lasted approximately 30 days. Sprint filed its TELRIC cost studies (Case No. 99-238-TP-UNC) for UNE deaveraging on March 2, 1999, and thus the Ohio Commission should be able to complete its Sprint proceeding by May 1, 2000, some fourteen months later. For unexplained reasons, GTE has not filed proposed UNE rates and will not do so until the Ohio Commission issues its decision concerning the pending GTE/Bell Atlantic merger. There does not appear to be any legitimate reason why GTE should be permitted to delay making available deaveraged UNEs based on its merger with Bell Atlantic. If anything, the pendency of that merger should be a basis for stringent enforcement of all of GTE's market-opening obligations.

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[8] 47 C.F.R. § 1.3.

CONCLUSION

To the extent and for the reasons stated above, the Commission should reconsider and clarify its Ninth Report & Order and Eighteenth Order on Reconsideration as requested in AT&T's Petition. In addition, the Commission should not delay the May 1, 2000 implementation of its UNE deaveraging rule nor grant the Ohio Commission a waiver.

Respectfully submitted,

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February 23, 2000

CERTIFICATE OF SERVICE

I, Laura V Nigro, do hereby certify that on this 23rd day of February, 2000, a copy of the foregoing "AT&T Reply to Oppositions to Petition for Reconsideration and Clarification of the *Methodology Order*" was served by U.S. first class mail, postage prepaid, on the parties named on the attached Service List.

/s/ Laura V. Nigro
Laura V. Nigro

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